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NO. 84-601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

DOUGLASS M. DUFFY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT DOUGLASS M. DUFFY IN OPPOSITION

RICHARD Z. FREEMANN, JR.
JOHN B. LANGEL
(Counsel of Record)
ELIZABETH W. FOX

Counsel for Respondent
Douglass M. Duffy

BALLARD, SPAHR, ANDREWS & INGERSOLL
30 South 17th Street
Philadelphia, PA 19103
(215) 564-1800

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COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented is whether the district court and the court of appeals correctly concluded that the employer-petitioner's discharge of employee-respondent violated the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, where the district court ruled that: (1) officials of the petitioner gave age-related reasons for discharging a number of its oldest employees; (2) the discharged respondent presented an undisputed *prima facie* case of age discrimination; and (3) the petitioner's articulated reason for the discharge was unworthy of credence.

COUNTERSTATEMENT OF THE CASE

In May 1980, petitioner Wheeling-Pittsburgh Steel Corporation ("W-P Steel") fired Douglass M. Duffy, age 59, as part of a 15% reduction in its sales force. (A. 26, 38, 125, 230).[1] After being fired, Duffy filed a complaint alleging that W-P Steel had violated the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. ("ADEA").

Duffy established at trial that he had been a successful steel salesman with the company for 25 years. (A. 27-29, 318). He proved that W-P Steel fired every salesmen over 55 and that only two of the twelve salesmen and

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[1] All references to "A" are to the Appendix to the briefs of the parties in the court of appeals.

sales managers fired were under 50. (A. 326-328, 337-339, 352-353). He also showed that in his sales district, W-P Steel fired the two other salesmen over 50 and one man in his 30's, while it retained two virtually untried young salesmen, ages 23 and 26. (A. 38, 39). The older men who were fired were being paid substantially more money than the young men who were retained. (A. 337-338).

The trial evidence also disclosed that shortly before and at the time of the discharges, W-P Steel made comments showing that age was a determining factor in the selection of the discharged employees. Just before the discharges, Duffy's district manager, Clyde Shelton, asked Duffy questions relating directly to the eligibility of Duffy and of a 61-year-old salesman for a

company pension. Specifically, he asked Duffy how old he was, how long he had been with W-P Steel and the age and length of service of the 61-year-old salesman who subsequently was discharged with Duffy. (A. 44-45). He also told Duffy that he thought W-P Steel would soon discharge some salesmen. Id.

At the time of the discharges, W-P Steel's vice president for sales, Cornel Bolog, spoke with other employees. He told one 59-year-old employee that W-P Steel was "anxious to get younger and more aggressive people in the field." (A. 215).

Presented with this evidence, the district court ruled (and petitioner does not dispute) that Duffy established a prima facie case of age discrimination. (A. 225). Duffy proved that he was 59, that he was fully qualified for

his job, that W-P Steel fired him and that W-P Steel retained two men in their 20's. (A. 38-39, 47-48). Beyond this, he proved that the company gave age-related reasons to explain why certain older employees were fired. (A. 44-45, 215).

W-P Steel tried to rebut the prima facie case by claiming that it discharged Duffy because his performance was not as good as the younger salesmen. (A. 235-237). After evaluating all of the evidence (including a series of inconsistent excuses on material matters offered by W-P Steel throughout the case and the age-related comments made by company officials), the district court concluded that W-P Steel's "performance" excuse was a fabrication created after Duffy filed suit to hide the fact that W-P Steel had fired Duffy because of his

age. (App. B at 35a-36a).[2] Based on these facts, the court found W-P Steel liable for age discrimination and awarded Duffy back pay, liquidated damages and reinstatement. (App. B at 38a-39a).

The record contains ample evidence to support the district court's conclusions that W-P Steel's "performance" excuse for firing Duffy was not true.

1. On several occasions just after he was fired, Duffy asked Shelton why he, rather than the younger men who had less experience and seniority, had been discharged. Shelton told him that his discharge was based solely on economics. Shelton did not mention Duffy's performance. (A. 36-41, 314-316). Duffy

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[2] All references to "App." are to the Appendices attached to petitioner's brief.

also asked Nicholas Weldon, the vice president in charge of personnel, if his dismissal had anything to do with poor performance. Weldon responded that the decision was not related to Duffy's performance. (A. 44). Before the filing of this suit, no one from the company ever claimed that Duffy's termination was based on performance. (A. 44, 68).

2. After Duffy filed his complaint, W-P Steel changed its story and, for the first time, gave performance as the reason for Duffy's discharge. In answers to interrogatories, W-P Steel asserted that three company executives, Bolog, Shelton and Frank McElhinney, had participated in the decision to fire Duffy and that Duffy was fired because of his performance. (A. 22-23). In their depositions, Bolog and McElhinney preserved the party line that they, along with Shelton, had selected Duffy for

termination and that the choice was based upon Duffy's performance. (A. 125-126, 153). When Shelton was deposed, however, he denied that he had played any role in the discharge decision. Moreover, he denied knowing that performance was a factor. (A. 178-179, 181-182, 191-192, 212).

3. Faced with Shelton's damaging deposition testimony, at trial W-P Steel again changed its story. Directly contradicting its sworn discovery versions of what occured, W-P Steel claimed that McElhinney alone had made the decision to fire Duffy based on Duffy's performance. (A. 234-237). This strategy backfired for two reasons. First, McElhinney's trial testimony was in direct contrast with W-P Steel's discovery statements. (A. 22-23, 125-126, 153, 234-236). Second, the trial evidence established that

McElhinney had absolutely no basis for comparing Duffy's performance with that of the two young, inexperienced salesmen retained. (A. 301-303). Despite a company policy requiring yearly written employee evaluations, W-P Steel had not completed an evaluation of Duffy in three years and had never evaluated the two young employees. (A. 156, 283-4, 291, 301-303, 307-308). Indeed, McElhinney had not even reviewed the outdated evaluations of Duffy completed in the mid-1970's.[3] (A. 156, 158, 235, 252-253). Worse, McElhinney admitted at trial that he never consulted Shelton, although Shelton was the only company

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[3] In its petition, W-P Steel misleadingly quotes extensively from Duffy's 1974, 1975 and 1977 evaluations. Because McElhinney never considered them, they cannot provide any support for the company's discharge decision.

official who was familiar with the daily sales performances of Duffy and the two young salesmen. (A. 178-179, 240-241, 262-263, 300-303). Thus, at trial McElhinney was forced to claim that he relied on his subjective impressions in making his "performance" evaluations. (A. 235, 253).

4. Finally, in discovery W-P Steel had identified tons of steel sold as important in the determination of whom to discharge. (A. 102, 104). In this area, Duffy's performance was superior to that of both young salesmen. (A. 253, 273-274, App. A at 7a).

Thus, the district court was left with trial testimony from W-P Steel which conflicted sharply with the company's original and revised pre-trial stories. Assessing all the evidence, the district court rejected the company's

rebuttal testimony as a fabrication.[4] (App. B at 35a-37a). It held: "[t]he Court has concluded... that plaintiff has proven that the defendant's explanation is unworthy of belief and is a mere pretext." (App. B at 35a).

The court of appeals reviewed the trial record and reached the same conclusion.

> [T]he evidence lends credence to the district court's inference that the alleged "poor performance" was a contrived story created by Wheeling-Pittsburgh after the fact. Because Wheeling-Pittsburgh's testimony and explanations were found not to be credible, they did not weigh against the evidence adduced by Duffy which supported the finding of pretext. Thus, the district court's finding of intentional discrimination cannot be held

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[4] W-P Steel nonetheless cites this discredited testimony extensively in its brief.

> to be clearly erroneous. We therefore conclude that Duffy has carried his required burden.

(App. A. at 9a).

Following the panel decision, W-P Steel's petition to the Third Circuit for rehearing in banc was denied. (App. C at 41a).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. This Case Presents No Conflict Among The Courts Of Appeals And No Important Unsettled Question Of Federal Law.

This intensely factual case presents no issue worthy of certiorari. In concluding that there had been age discrimination, the lower court properly applied settled law to the facts. Following the procedure set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as explained in Texas

Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the district court ruled that Duffy established a prima facie case of age discrimination by proving that he was 59 when he was terminated, that he was qualified for his job, that two young salesmen were retained and that W-P Steel made age-related comments in connection with the dismissals. (App. B at 35a).

W-P Steel attempted to rebut the prima facie case by claiming that it based its discharge decision on the "performance" of the employees. Id. After a careful evaluation of the witnesses and the other evidence, the district court rejected W-P Steel's "performance" excuse as untrue. Id. This left Duffy's evidence of age discrimination unrebutted and amply supported the district court's liability finding. (App. B at 37a).

Every circuit has agreed that a plaintiff may use this method to prove age discrimination. E.g., Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984); Parker v. Federal National Mortgage Assoc., 741 F.2d 975 (7th Cir. 1984); Blim v. Western Electric Co., Inc., 731 F.2d 1473 (10th Cir. 1984), cert. denied, 53 U.S.L.W. 3241 (U.S. Oct. 2, 1984) (No. 84-72); Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983); Coburn v. Pan American World Airways Inc., 711 F.2d 339 (D.C.Cir.), cert. denied, 104 S.Ct. 488 (1983); Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2d Cir. 1983); Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983); Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), cert. denied, 104 S.Ct. 348 (1983); Rose v. National Cash Register Corp., 703 F.2d

225 (6th Cir.), cert. denied, 104 S.Ct. 352 (1983); Golomb v. The Prudential Insurance Co. of America, 688 F.2d 547 (7th Cir. 1982); Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982); Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981); Jackson v. Sears, Roebuck & Co., 648 F.2d 225 (5th Cir. 1981); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

The Third Circuit properly applied this standard in reviewing the district court's decision. It reviewed McDonnell Douglas and Burdine and listed the requirements to prove a prima facie case. (App. A at 4a). It then

noted the employer's obligation to "dispel the adverse inference [established by the prima facie case] by articulating 'some legitimate, non-discrimiatory reason for the employee's rejection.'" Id. The court recognized that if the employer articulates a non-discriminatory reason for the discharge, "the ultimate burden remains with the plaintiff to prove to the trier of fact that the defendant intentionally discriminated against the plaintiff." Id.

After reviewing the standards of McDonnell Douglas and Burdine and applying them to the facts in this case, the Third Circuit rejected W-P Steel's argument that the district court relied on "pretext" alone in reaching its conclusion. The Third Circuit recognized that the district court addressed and rejected as a fabrication W-P Steel's

articulated justification only after it found that Duffy established a prima facie case of age discrimination. It reasoned:

> As stated by the Court in Burdine, after the plaintiff has established a prima facie case and the defendant has articulated a nondiscriminatory reason for the challenged action, the plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the Court that [the employee] has been the victim of discrimination. [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. See also United States Postal Service Bd. of Governors v. Aikens, 103 S.Ct. 1478 (1983); Massarsky, 706 F.2d at 118-19; Behlar v. Smith, 719 F.2d 950, 952 (8th Cir. 1983).

(App. A at 5a).

Tellingly, W-P Steel cannot point to a single appeals court decision

which conflicts with the Third Circuit's analysis. Nor is there any reason why this Court should reconsider its earlier, well-reasoned decisions.

In a desperate attempt to attract this Court's attention, W-P Steel claims that a legal error meriting certiorari arises because the district court substituted its own business judgment for that of W-P Steel. W-P Steel characterizes the trial court's decision as an "unwarranted intrusion into the sphere of business judgment legitimately reserved for management" and "judicial intermeddling". (Petition at 7 and 16). The simple answer to this is that the district court did not substitute its business judgment for that of company officials. Rather, the district court understood the distinction between business judgment and incredible testimony and decided that W-P Steel's excuse was

incredible. As the trial court noted, had W-P Steel fired Duffy for a legitimate business reason, even if that reason were unwise or incorrectly applied, W-P Steel would have won. (App. B at 33a); Halsell v. Kimberley-Clark Corporation, 683 F.2d 285, 292 (8th Cir. 1982), cert. denied, 103 S.Ct 1194 (1983). The district court concluded, however, that W-P Steel had not fired Duffy for a legitimate business reason. After reviewing the record and seeing and hearing the witnesses, the court rejected W-P Steel's "performance" excuse as a lie, a story made up to conceal W-P Steel's age discrimination. (App. B at 35a).

Contrary to W-P Steel's assertions, the district court's ruling was not an unwarranted invasion into legitimate corporate decision making, but was a carefully rendered decision based on

credibility determinations. The district court did not substitute its judgment for W-P Steel's and W-P Steel's attempt to insulate its discriminatory acts from judicial scrutiny by shouting "interference with business judgment" is, like its trial evidence, disingenuous and should be rejected.

Likewise, this Court should not accept W-P Steel's assertion that, unless reversed, this case will "stifle the painful but essential restructuring efforts that are being undertaken by many American industrial enterprises in an attempt to regain economic viability." (Petition at 16). Essentially, W-P Steel is requesting a judicially created exemption from the requirements of the ADEA on the grounds that the American steel industry will not survive unless permitted to engage in age discrimination.

This, of course, is absurd. Neither the ruling in this case nor the ADEA itself prohibits lay-offs or discharges in any industry. All that is required is that the decisions be made in reliance on factors other than age. Accordingly, the request should be denied.

II. This Case Is Inappropriate For Review Because It Involves Only Factual And Credibility Determinations Of The District Court Which The Appeals Court Reviewed And Held To Be Not Clearly Erroneous.

The decision in this case rests squarely on the factual determinations of the district court judge who saw the witnesses and considered the evidence. The trial court painstakingly considered three days of trial testimony and exhibits and reviewed the detailed findings of fact of the parties. In the end, it found much of the testimony presented by W-P Steel to be unworthy of credence.

A decision to disbelieve testimony is peculiarly within the province of the fact-finder. As the appeals court observed:

> It is not our function to review the inconsistencies in the evidence and determine what testimony is to be credited. That function is one which is to be discharged, as the district court did here, by the trial judge. To argue, therefore, as does the dissent, that credit should have been given to witnesses from Wheeling-Pittsburgh when the district court explicitly declined to credit that testimony not only blurs the distinction that has been established between the district court and the appellate court provinces, but also would require in every instance our de novo review of the trial court's credibility determinations, even assuming that such review were feasible.

(App. A at 8a).

Such a de novo review would be even more inappropriate for this Court. Graver Tank & Mfg. Co. v. Linde

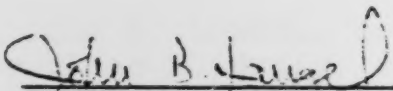
Air Products Co. 336 U.S. 271, 275 (1949); United States v. Johnston, 268 U.S. 220, 227 (1925). The district court properly discharged its function by rejecting as incredible the testimony of W-P Steel's witnesses. (App. B at 35a). The appeals court then reviewed the entire record with care and held that the district court's ruling was not clearly erroneous. (App. A at 9a); Fed.R.Civ.P. 52(a); Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273 (1982). This Court's precious time should not be consumed with rehashing this intensely factual dispute.

CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: November 13, 1984

Respectfully submitted,



Richard Z. Freemann, Jr.
John B. Langel
(Counsel of Record)
Elizabeth W. Fox

Counsel for Respondent
Douglass M. Duffy

OF COUNSEL:

BALLARD, SPAHR, ANDREWS & INGERSOLL
30 South 17th Street
Philadelphia, Pennsylania 19103
(215) 564-1800

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v.

DOUGLASS M. DUFFY, NO. 84-601

Respondent

PROOF OF MAILING

I, JOHN B. LANGEL, counsel of record for Douglass M. Duffy, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of November, 1984, forty copies of the foregoing Brief for Respondent were deposited in a United States post office located at 30th and Market Streets, Philadelphia, Pennsylvania, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States at the United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, within the time allowed for filing.

John B. Langel

Sworn to and subscribed
before me this 13th day
of November, 1984.

Annis Lee Reeves
Notary Public

ANNIS LEE REEVES
Notary Public, Phila., Phila. Co.
My Commission Expires Nov. 25, 1985

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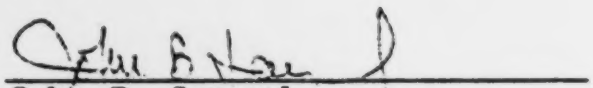
Respondent

CERTIFICATE OF SERVICE

I, JOHN B. LANGEL, counsel of record for Douglass M. Duffy, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of November, 1984, three copies of the foregoing Brief for Respondent were served on Wheeling-Pittsburgh Steel Co., Inc., petitioner, by mailing said copies in a duly addressed envelope, with first class postage prepaid, to Paul Manion, Esquire, Manion, Alder & Cohen, P.C., 600 Grant Street, Fifth Floor, Pittsburgh, PA 15219.



John B. Langel
Attorney for Douglass M. Duffy,
Respondent
30 South 17th Street
Philadelphia, PA 19103
(215) 564-1800